Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1998

QUENTIN HIDEYUKI TAHARA,

Petitioner,

v.

MATSON TERMINALS, INC.;
MATSON NAVIGATION COMPANY, INC.;
McCABE, HAMILTON & RENNY CO. LTD.;
INTERNATIONAL LONGSHOREMEN AND
WAREHOUSEMEN'S UNION, LOCAL 142;
BRUCE GEORGE PERRY;
and HENRY KREUTZ, JR.,

Respondents.

Petition For A Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), must have (1) a hierarchical structure, and (2) an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity.

2. Assuming that the Ninth Circuit's definition of an association-in-fact enterprise under RICO is upheld, does a plaintiff have the burden of pleading facts to establish an association-in-fact enterprise as defined by the Ninth Circuit given that Fed.R.Civ.Pro. 8 only requires notice pleading?

3. Whether an individual in a witness protection program, who voluntarily changes his residence, can purposefully create diversity of citizenship jurisdiction under 28 U.S.C. 1332.

4. Whether the 1984 amendments to the Longshore Harborworkers' Compensation Act 33 U.S.C. §§ 904(A) & 905(A) abolished the borrowed servant doctrine, as created by the Fifth Circuit.

LIST OF PARTIES

Petitioner: Quentin Hideyuki Tahara

Respondents:

1. Matson Terminals, Inc.
2. McCabe, Hamilton & Renny, Co., Ltd.
3. Longshoremen's and Warehousemen's Union, Local 142
4. Bruce George Perry
5. Henry Kreutz, Jr.

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On July 8, 1998, a panel of the Ninth Circuit upheld the Hawaii District Court's judgment, granting summary judgment on Quentin Tahara's claim under the Racketeer Influenced and Corrupt Organization Act ("RICO") (App. E-4), because he did not plead the requisite existence of an associated-in-fact enterprise with an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity, with the requisite mechanism for controlling and directing the affairs of the group on an on-going, rather than ad hoc, basis. (App. B-2.)

The Ninth Circuit also upheld the District Court finding that Quentin Tahara failed to sustain his burden of proof on residency in the new state, for purposes of diversity of citizenship jurisdiction, when he voluntarily moved to Arizona while participating in a witness protection program, awaiting the opportunity to testify at the criminal trial of the assailant who beat and blinded him for reporting the assailant's alleged racketeering activities. (App. B-4.)

The Ninth Circuit also dismissed Tahara's case without addressing whether or not the 1984 amendments to the Longshore Harbor Workers' Compensation Act did away with the "borrowed servant" doctrine, holding that this question did not implicate any considerations of maritime law or water-based commerce, or invoke any federal interest in uniformity of decision requiring the application of federal substantive law. (App. B-3.)

Quentin Tahara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The denial for the petition for rehearing (App. A, infra), is unreported. The Ninth Circuit panel's decision (App. B, infra), is unreported. The District Court's Order Concerning Defendant ILWU's Motion For Clarification (App. C, infra), is unreported. The District Court's Order Regarding Plaintiff's Motion for Reconsideration (App. D, infra), is unreported. The District Court's Order Granting Defendants' Motion for Summary Judgement on Federal RICO Claim and Dismissing Without Prejudice All Remaining Claims for Lack of Subject Matter Jurisdiction (App. E, infra), is unreported. The District Court's Order Denying Plaintiff's Cross Motion For Leave to File Second Amended Complaint (App. F, infra), is unreported.

JURISDICTION

The Court of Appeals entered its Order Denying Petition for Rehearing on August 28, 1998. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961(4) and (5), as set forth in App. I, infra. The Longshore Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §§ 904(a) and 905(a), as set forth in App. J, infra.

STATEMENT

Quentin Hideyuki Tahara (hereinafter "Tahara") was employed by McCabe, Hamilton & Renny Co., Inc. (hereinafter "McCabe") as a stevedore for more than 10

years. During this time he had been a member of the International Longshoremen Warehousemen's Union Local 142 (hereinafter "Union"). Tahara was in line to be a permanent Crane Operator and was occasionally working as a Substitute Crane Operator.

In March 1994, Tahara confidentially reported to Matson Terminals, Inc. (hereinafter "Matson") a co-worker, Bruce Perry (hereinafter "Perry"), for "running away". "Running away" is an activity where the worker arrives at the job site, checks in and then leaves, causing his co-workers to do the work of the person who runs away. Running away is a form of theft from the employer, who passes the shipping costs onto the public. Perry's time was believed to have been cut because of Tahara's report. Three of the ten-member gang, known as the "Perry Boys," had run away that day. The "Perry Boys" is a gang whose acts of violence extends beyond the docks into areas of (alleged extortion for) commercial protection of bars and restaurants.

The Union, McCabe and Matson have been aware of this "running away" for years. Henry Kreutz (hereinafter "Kreutz") is the Union Vice-chairman and Bruce Perry's brother-in-law. Kreutz used his Union power to find out the identity of Tahara as the person who reported Perry.

After learning from Matson that Tahara had reported Perry, Kreutz confronted Tahara in a threatening manner in the Matson parking lot, intimidating Tahara into admitting he reported Perry.

On March 30,1994, Perry was waiting in the Matson terminals parking lot for Tahara to arrive for work as a crane operator. Perry confronted Tahara stating "Why the f*** you have to cut my time?" Perry then viciously attacked Tahara,

crushing Tahara's skull which permanently severed Tahara's optic nerve, causing blindness. Perry continued to beat and kick Tahara as he lay on the ground unconscious, breaking at least four of Tahara's ribs.

The beating took place in plain view at the Matson Terminal employee gate at the change of shift, where all the workers arriving to work and leaving work pass. Tahara was taken to the hospital for emergency surgery and the police began an attempted homicide investigation.

Tim Guard, the President of McCabe, Nat Lum the ILWU Union Chairman, the assailant Perry, Kreutz, and Bob Bee, McCabe Vice President, met within a couple of days of the beating. Perry was assured that he would keep his job despite having nearly killed Tahara.

The public beating of Tahara was to enforce and perpetuate the Perry Boys "running away" activity. The Perry Boys' use of violence and beatings extended beyond the waterfront workplace, to beatings in other parts of Honolulu, including Restaurant Row. Plaintiff submitted sworn police testimony regarding the Perry Boys' reputation for violence off and on the waterfront.

Tahara filed a LHWCA claim for benefits from McCabe and Matson. McCabe and Matson denied that Tahara was their employee at the time of the beating because of a labor loan agreement, making Tahara and his co-workers "Borrowed Servants."

For six months Tahara was without any benefits, payment for medical care or compensation, because of the confusion over who was Tahara's employer. Tahara had worked on the waterfront for 10 years and to his

understanding, for the same employer. An Informal Conference was held at the Department of Labor's Office of the Workers' Compensation Programs. A Memorandum of Informal Conference was issued on October 27, 1994. Matson eventually paid compensation benefits when they realized Tahara was going to sue them and Matson wanted the benefit of §905(a) tort immunity. The borrowed servant doctrine and the "labor loaning" concept has defeated one of the primary purposes of the LHWCA, the provision of prompt payment by the employer to the injured employee. Tahara sought to resolve the issues determining his employer under LHWCA by cross-motion for summary judgment in the District Court.

Tahara's blindness from the beating resulted in Tahara's inability to meet the minimum vision requirement to work as a crane operator. Crane operator is the highest paying job opportunity on the Honolulu waterfront. Tahara returned to work for a short while as a low-level clerk until he entered a witness protection program.

Tahara cooperated with the Honolulu Police Department and F.B.I. investigations on the beating and racketeer activities on the Honolulu waterfront. This cooperation included wearing a body wire to tape-record his meeting with key witnesses.

In May 1995, Tahara was approached by the Honolulu Police Department and placed in protective police custody because the police believed Tahara's life was in immediate danger and that the police could not protect Tahara while he was working. Tahara was secretly housed in federal military installations in Hawaii. Tahara was moved to California in a witness protection program while awaiting his testimony in

the criminal trial of Perry because of the extraordinary costs of providing around-the-clock police protection.

Tahara left his home in the State of Hawaii to live in protective custody as he was afraid he would be killed by the Perry Boys if he stayed in Hawaii, to prevent his testifying against Bruce Perry. Tahara had a specific intent not to reside in Hawaii. Tahara was permitted to pick where he wanted to move to and he chose Arizona. Tahara had a specific intent to reside in Arizona. Among the reasons Arizona was purposely chosen by Tahara as his new home, was to create diversity of citizenship jurisdiction, so that he could avail himself of a federal forum to resolve his claims for recovery.

On February 17, 1997, Tahara physically moved to Arizona, rented a home, obtained an Arizona driver's license and registered to vote in Arizona. He was physically living in Arizona, when his suit was filed in Hawaii. He has continued to file for and pay Arizona state taxes for several years. Tahara has two children who live with their mother in Honolulu. Tahara was never married to their mother and she had both legal and physical custody of the children. Tahara kept a telephone with an answering machine in Hawaii so that he could be contacted without anyone knowing where he had moved.

Tahara filed a complaint on March 18, 1996 and before service was effected, filed a First Amended Complaint on March 27, 1996 in the U.S.D.C. to correct some initial typographical errors. He also filed (but never served) a Complaint and First Amended Complaint with the State court as a protective pleading because the statute of limitations was about to run. The state action was removed to the U.S. District Court and these cases were then consolidated. Only

the federal court First Amended Complaint was served and answered.

Matson filed a Motion for Summary Judgment now claiming to be Tahara's employer and therefore immune from liability and claiming that plaintiff could not meet the injury to business and property standing requirement of RICO. The Union moved to dismiss, claiming LMRA §301 preemption and no RICO damages standing. McCabe moved for partial summary judgment on several RICO issues and preemption by NLRA.

Tahara filed a Cross Motion for Summary Judgment, asking the Court to determine as a matter of law that McCabe was his employer and the viability of the "borrowed servant" doctrine, after the 1984 amendments to LHWCA. Tahara also asked for summary judgment that he has suffered business or property damages for RICO standing. Tahara also filed a Motion for Leave to Amend his complaint. The District Court denied or refused to consider Tahara's motions. App. F, infra.

On February 25, 1997, the District Court granted defendants' motion finding plaintiff lacked standing because there were no "damages" to Tahara's business or property. The District Court never mentioned the "enterprise" requirement under RICO. The Court sua sponte found no diversity jurisdiction for failing to explain how a person who has been working in Honolulu for ten years could be an Arizona resident. App. E-14. On February 28, 1997, Tahara filed a Motion for Reconsideration followed on March 12, 1997 by a Notice of Appeal. On April 30, 1997, the District Court issued its Order denying Tahara's Motion for Reconsideration (App. D), because he used his old address

when he transferred ownership of his Hawaii property into a trust for his children because he was fearful for his life, and because he had a telephone number which was listed in the Oahu telephone directory, and an answering machine. Tahara filed an Amended Notice of Appeal on May 8, 1997. The Union asked for further clarification on May 21, 1997, and on July 1, 1997 the District Court issued its Order Concerning Clarification. (App. C.)

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Resolve Conflicting Circuit Court Opinions On The Requirements For An Association-In-Fact Enterprise Under RICO.

RICO defines the term "enterprise" to include (1) "any individual, partnership, corporation, association, or other legal entity," and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961 (4). The Supreme Court is requested to grant certiorari to determine the minimum requirements for an associated-in-fact enterprise.

Admittedly, the term "enterprise" is broad. Broad terms are consistent with the "liberal construction" clause of RICO that provides the chapter is to be liberally construed to effectuate Title IX's remedial purposes. Congress' intent should not be frustrated by an overly narrow reading of RICO. Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

Congress used general terms in RICO because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are "enterprise" in §1961(4); "racketeering activity" in §1961(1)

(1982 ed.); and "participate" in §1962(c). Rusello v. United States, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17, 19 (1983).

Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a board array of perpetrators operating in many different ways. H.J. Inc., et al. v. Northwestern Bell Telephone Co., et al., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

In United States v. Turkette, 452 U.S. 576, 69 L.Ed.2d 246, 101 S.Ct. 2524 (1981), this Court found that "there is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." Id., at 580.

The Ninth Circuit Court of Appeals interpreted the Supreme Court's decision in United States v. Turkette, 452 U.S. 576, 69 L.Ed.2d 246, 101 S.Ct. 2524 (1981), as requiring that "a RICO enterprise must have an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity." Chang v. Chen, 80 F.3d 1293, 1295 (9th Cir. 1995).

Six other circuits have also interpreted the Supreme Court's decision in Turkette to require a RICO enterprise to have an ascertainable structure separate and apart from the pattern of racketeering activity in which it engaged. United States v. Riccobene, 709 F.2d 214, 223-24 (3d Cir.) (as amended), cert. denied, 464 U.S. 849 (1983); United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985); Atkinson v. Anadarko Bank and Trust Co., 808 F.2d 438, 441 (5th cir.) (per curiam), cert. denied, 483 U.S. 1032, 97 L.Ed.2d 780, 107 S.Ct. 3276 (1987); Richmond v. Nationwide Cassel L.P.,

52 F.3d 640, 645 (7th Cir. 1995) (citing United States v. Neapolitan, 791 F.2d 489, 499-500 (7th Cir.), cert. denied, 479 U.S. 940, 93 L.Ed.2d 372, 107 S.Ct. 422 (1986); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); United States v. Sanders, 928 F.2d 940, 944 (10th Cir.) cert. denied, 502 U.S. 845, 116 L.Ed.2d 109, 112 S.Ct. 142 (1991).

The Second Circuit and the Eleventh Circuit have not required an enterprise to have an ascertainable structure separate and apart from the structure arising out of the pattern of racketeering activity. United States v. Bagaric, 706 F.2d 42, 55 (2d Cir.), cert. denied, 464 U.S. 840 (1983); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.), cert. denied, 464 U.S. 856, 78 L.Ed.2d 157, 104 S.Ct. 175 (1983). Tahara prevails in his RICO claim under this interpretation of the law.

II. Certiorari Should Be Granted as the Federal Circuits are Split as to Pleading Requirements for an Association-in-Fact Enterprise Under RICO.

The Ninth Circuit Chang v. Chen, 80 F.3d 1293 (9th Cir. 1995) opinion did not even discuss, much less explain, why the enterprise *proof* burden it established was a necessary *pleading* burden for a RICO plaintiff. The Chang opinion went on to uphold the district court's refusal to allow amendment of the complaint's enterprise allegations, notwithstanding the Ninth Circuit's concession that it had previously "not yet resolved how much structure RICO's enterprise element requires." Chang, 80 F.3d at 1298.

The Seventh Circuit has also adopted enterprise pleading requirements. Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995). According to the Seventh

Circuit, a RICO "pleading must state the essential elements of the RICO action or it is worthy of dismissal," Richmond, 52 F.3d at 645-46. The Fifth Circuit has reached a similar conclusion. Montesano v. Seafirst Commercial Group, 818 F.2d 423 (5th Cir. 1987).

By contrast, in Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d at 789-790 (3d Cir. 1984), cert. denied, 409 U.S. 1211 (1985), the Third Circuit adhered to the notice pleading philosophy underlying Rule 8, in holding that the plaintiff need not allege all the RICO enterprise factors.

III. Certiorari Should Be Granted To Determine If A Person In A Witness Protection Program Can Change His Domicile To Create Diversity For Purposes Of 28 U.S.C. § 1332.

The District Court sua sponte raised the issue of diversity jurisdiction. Without first requesting submission of evidence or argument from the parties, the District Court dismissed the case finding "even if plaintiff moved to Arizona recently, or some time soon after or before filing suit, he has not met the burden of establishing Arizona domicile for purposes of diversity".

After receiving the District Court's ruling, plaintiff moved the court to reconsider jurisdiction and submitted an Affidavit of Quentin Tahara and his Arizona driver's license and Arizona voter registration. Tahara had 10 days to prepare a response and submit evidence in response to this dismissal.

The license and voter's registration are among the types of evidence that are considered in connection with a

domicile determination. Courts traditionally list the following factors as relevant to the domicile determination: current residence, voting registration and practice, driver's license and automobile registration, location of personal and real property, location of bank accounts, location of spouse and family, place of employment and business, and payment of taxes. Wright & Miller, Federal Practice and Procedure par. 3612, at 529-31 (citing authorities). See also Bruton v. Shank, 349 F.2d 630, 631 n.2 (8th Cir. 1965). Tahara has filed Arizona state taxes since the original briefing on this issue.

Quentin Tahara is a man who was nearly beaten to death, for reporting gang and union corruption. Quentin Tahara fled Hawaii in search of personal safety. He did not intend to live in Hawaii. Applying the traditional indicia of domicile to determine Tahara's intended domicile is an exercise that made little sense. Tahara's "intent" was to live in a place where his life would not be in jeopardy. That was in a place where the defendants were not. He picked Arizona.

Quentin Tahara was voluntarily relocated to save the State of Hawaii expense. He was provided with subsistence and assisted in keeping his whereabouts a secret. Even his attorney had to contact him through the police department or by leaving a message on his answering machine.

The decision to relocate to Arizona was entirely plaintiff's own. Even the police department did not know where in Arizona plaintiff was relocating. Tahara considered moving to Las Vegas. The police department rejected the idea because of the presence of so many Hawaiian visitors to Las Vegas it was possible Tahara might be seen. Tahara was residing in Arizona at the time suit was filed.

Any person sui juris may acquire a new domicile at any time and for any reason. Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962). A change in domicile typically requires only the occurrence of (1) physical presence at the new location with (2) an intention to remain there indefinitely. Lew v. Moss, 797 F.2d 747 (9th Cir. 1986). When these two prerequisites occur simultaneously the new domicile is acquired instantly. If the bona fide establishment of a new domicile is proven, the motive for its acquisition and the length of duration become irrelevant. Williamson v. Ostenton, 232 U.S. 619 (1914).

> [H]is right to sue in the courts of the United States is nonetheless because his change of domicile was induced by the purpose, whether avowed or not, of invoking, for the protection of his rights, the jurisdiction of a Federal court. Morris v. Gilmer, 129 U.S. 315, 328 (1889)

If the change of domicile is bona fide, the right to sue in Federal court is not affected by motive. Shoaf v. Fitzpatrick, 109 F.2d 290 (6th Cir. 1939), cert. denied, 60 S.Ct 295, 308 U.S. 620, (1939).

Tahara has met his burden of demonstrating his move to Arizona was bona fide. There is no evidence to the contrary. Where his children live does not matter as they have never lived with him. Selling or transferring real estate is not residing in a state. The only connection Tahara had to Hawaii on the day he filed suit, was an answering machine. There is a privacy issue here.

The Constitution of the United States and the Judiciary Act of 1789 bestow diversity jurisdiction to controversies

between citizens of different states. The traditional explanation remains, that offered by Chief Justice Marshall:

> However true the fact may be that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehension of suitors that it has established national tribunals for the decision of controversies between aliens and citizens, or between citizens of different states." Bank of the United States v. Deveux, 5 Cr. (9 US) 61, 87 (1809).

See, also Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L.Rev. 483 (1928). One could create diversity by a bona fide change of domicile even with the sole motive of creating diversity. Williamson v. Ostenton, 232 U.S. 619 (1914).

Tahara was beaten, blinded and placed in protective custody. Tahara was living in Arizona with the intent to remain there when the suit was filed. Tahara believes he needs the refuge of the Federal court and that is why he seeks it. He cooperated with State and Federal authorities in their efforts to prosecute violent racketeers. Is it possible that if he did not go into the witness protection program and had moved to Arizona on his own, he would have diversity, but because the government helped to protect him, the move was not bona fide?

Tahara's intent was to establish residency in Arizona to secure the benefit of a federal forum, even if his RICO

claim was dismissed. This is not motive, it is intent to remain in Arizona for the foreseeable future.

IV. Certiorari Should Be Granted So This Court May Determine Whether the 1984 Amendments to the LHWCA Abolished the Borrowed Servant Doctrine.

In West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir.), the Fifth Circuit acknowledged that Congress may have abolished the borrowed servant doctrine in 1984. WMATA v. Johnson, 467 U.S. 932, 104 S.Ct. 2832 (1984) is the case which prompted Congress to enact the 1984 Amendments to LHWCA. Plaintiff requests this Court to review this matter and find that the 1984 Amendments abolished the borrowed servant doctrine as it applies to the LHWCA. This doctrine has caused endless mischief and delay to the injured worker on the waterfront. Employers haggle while the worker suffers. This issue is of urgent concern to national maritime policy and is capable of repetition, yet avoiding review.

In WMATA, the Supreme Court granted a writ of certiorari to determine when a contractor is entitled to immunity from suit by a subcontractor's employee under the LHWCA. After reviewing §4(a) and §5(a) (App. J), Justice Marshall indicated the wording of these two sections was ambiguous. There was no clear indication if the immunity granted to employers in §5(a) applied to the contractors mentioned in §4(a). He indicated two distinct inquiries had to be made: "First, does §5(a)'s grant of immunity ever extend to general contractors? And second, if §5(a) can extend to general contractors, what must a general contractor do to qualify for §5(a)'s immunity?" WMATA, 467 U.S. 932, 104 S.Ct. 2832.

Reviewing the case law and the intent of these two sections, Justice Marshall concluded that §5(a) could cover general contractors. Justice Marshall found that when the two Sections are considered together, they appear to grant a contractor immunity from suit by the subcontractor's employees unless the contractor has neglected to secure Longshore coverage. Justice Marshall concluded that WMATA was entitled to immunity from the tort actions brought by the subcontractor's employees.

In a matter of months, Congress amended §4(a) and §5(a) of the LHWCA to overturn the Supreme Court's decision. In its Conference Report, the Joint Committee stated:

> The Conference substitute, in disapproving WMATA v. Johnson, achieves the following: First, the obligation of the contractor to secure compensation for the employee of the subcontractor is a contingent one, which is triggered only upon the failure of the subcontractor to secure compensation for its own employees. Second, the contractor remains amenable to suit by its subcontractor's employees in instances where the subcontractor-employer has fulfilled its statutory obligation to secure compensation for its employees. Third, however, where the subcontractor defaults in securing compensation, thus triggering the contractor's obligation, the contractor is deemed an "employer" for purposes of section 5 and is therefore entitled to immunity from suit by the subcontractor's employees. Fourth, if the contractor utilizes a "wrap-up" insurance policy to provide insurance coverage for the benefit of satisfying the subcontractor's primary obligation to secure compensation, the contractor still remains amenable to suit by employees of the sub-

contractor; the contractor does not enjoy the immunity afforded by Section 5(a) of the Act. (emphasis added) H.R. Report No. 98-1027, 98th Cong. 2d Sess.24 (1984)

As amended, the wording in §4(a) and §5(a) forecloses the designation of any contractor as the employer of its subcontractors' employees - even if a borrowed employee relationship existed - unless the subcontractor failed to secure the payment of compensation. McCabe secured workers' compensation coverage in the present case. McCabe's insurer Eagle participated in the LHWCA claim. Additionally, McCabe secured compensation by shifting the obligation to provide coverage on incidents at Matson to Matson in the "Stevedoring and Terminal Services Agreement" between McCabe and Matson. Tahara never consented to this relationship. He is not a party to this agreement, he is the victim. Now the two parties to the agreement are fighting and Tahara suffers the brunt of the contracting parties' inability to agree on who is his employer. This is a contract to bargain for immunity from tort liability. It is a loophole that is offensive to public policy. The sole purpose is to disadvantage the worker who is not even a party to the agreement.

The Fifth Circuit considered whether Congress abolished the borrowed servant doctrine in West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985).

Kerr-McGee filed a motion for summary judgment, contending West was its borrowed employee and as such Kerr-McGee enjoyed immunity from suit under §5(a) of the LHWCA. The court agreed and dismissed West's action.

On appeal, the Fifth Circuit noted that two situations arise in which the court must determine if the employer is entitled to immunity from suit: (1) when the defendant is not the plaintiff's employer but it contends the plaintiff is acting as the defendant's borrowed employee; and (2) when the defendant is a general contractor whose subcontractor is the true employer of an injured employee. In the first situation, the employer would enjoy such immunity if the employer could show the employee met the borrowed employee tests in Ruiz v. Shell Oil, 413 F.2d 310 (5th Cir. 1969) and Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977). The second situation arises when the subcontractor's employee is injured, receives Longshore benefits and files a third party suit against the general contractor. The general contractors argued that they were entitled to immunity from suit since they had to guarantee the payment of compensation to the subcontractor's employees.

Acknowledging that Congress may have abolished the borrowed servant doctrine under the LHWCA, the Fifth Circuit noted,

> "[t]he bare language of the amendment to §5(a) could also be interpreted as foreclosing any designation of any contractor as the employer of its subcontractors' employees - even if a borrowed employee relationship existed - unless the subcontractor failed to secure compensation payments." 765 F.2d at 529.

While the Fifth Circuit acknowledged that the plain language of the 1984 Amendments could be construed to abolish the borrowed servant doctrine, the Fifth Circuit went on to conclude that the borrowed servant doctrine under the LHWCA which had been created in the Fifth Circuit was alive and well.

In West, supra, the majority opinion acknowledged that the 1984 Amendments could be construed to abolish the borrowed servant doctrine. The concurring opinion of Judge Tate (of blessed memory) found that the borrowed servant doctrine was abolished by the 1984 Congressional clarifications and noted:

> The Congressional report did not refer to this thin line of mostly Fifth Circuit jurisprudence [LHWCA borrowed servant doctrine], totally inconsistent with the general purposes and express language of the 1984 Amendments. I do not find the absence of reference to these decisions, and a brief conclusory statement of the Legislative Report, has any indication that the Congress desired to preserve the precedential effect of all and any pre-1984 Amendment judicial decisions, nor especially of any that were completely contrary to the unambiguous language of the 1984 Amendments - which was specifically intended to clarify that a general contractor enjoyed no tort immunity as to work injuries sustained by a subcontractor's employee, where that subcontractor had (as here) secured the payment to the injured employee of compensation benefits accorded him by the act.
>
> . . .
>
> Whatever merits there may have been to the borrowed servant tort immunity judicially granted to that contractor - albeit, without judicial analysis of the act or reasoned judicial explanation for the immunity - has disappeared with the 1984 clarification.
> West, 765 F.2d at 534

Judge Tate's concurring opinion is persuasive, the majority concedes that the plain language of the 1984 Amendments can be read as Judge Tate suggests. In the 1984 Amendments, Congress abolished the borrowed servant doctrine. The difficulties and delays which application of the borrowed servant doctrine has caused, undermines the humanitarian purposes of the LHWCA.

LHWCA immunity is based firmly on a statutory, non-consensual "quid pro quo" attached to the employment relationship itself: the limited statutory benefits provided by the Act (medical care and payment of part of lost earnings), payable by the employer promptly without awaiting the outcome of litigation except in cases of genuine dispute, without regard to fault of either the employer or employee, in return for foreclosure of recovery for full damages otherwise recoverable from the employer.[1]

A multi-factor test relying upon information outside of the knowledge of the employee which allows for subjective judgments as to the weight and outcome given each factor is especially unsuitable for use in determining who has to provide the benefits called for by the Act. Promptness is essential to the value of the Act. It is not fair for workers to trade the full liability that otherwise would be available against a party for uncertainty as to who is their employer. The purpose of the act has been reversed - the borrowed servant doctrine creates uncertainty of payments to the worker

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[1] Quentin Tahara did not receive any payment for seven months after both possible employers filed acknowledgments of the claim in the form of LS-202's. The companies did not first attempt to see that the injured worker's rights to medical care and compensation were secured instead they proceeded to dispute among themselves who was ultimately responsible for the payment.

and is frustrated by parties competing against each other with regard to payment of benefits and immunity.

Justice and human dignity dictates a finding that the borrowed servant doctrine was abolished and put an end to the situation which encourages employers to litigate against each other while employee benefits are delayed and denied pending the outcome of a determination of who is the "employer". Traditional tests of sanity include questions like, "what year is this," "who is the president of the United States," and "who is your employer?" Is it possible that after 10 years on the job, Tahara could not answer that question?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUENTIN HIDEYUKI TAHARA,	)	NO. 97-15426
	)	
Plaintiff-Appellant,	)	D.C. Nos.
	)	CV-96-00284-DAE
vs.	)	CV-96-00410-DAE
	)	CV-96-00412-DAE
MATSON TERMINALS, INC.; MCCABE HAMILTON & RENNY, CO., LTD.; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142; BRUCE GEORGE PERRY; HENRY KREUTZ, JR.; JOHN DOES 1-20; MARY DOES 1-20; DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES 1-20; DOE STATES 1-10; OTHER ENTITIES 1-20,	)	ORDER
	)	(Filed Aug. 28, 1998)
Defendants-Appellees.	)	

Before: HALL and THOMAS, Circuit Judges, and WHALEY*, District Judge.

The petition for rehearing is denied.

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* Honorable Robert H. Whaley, United States District Judge for Eastern Washington, sitting by designation.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUENTIN HIDEYUKI TAHARA,	)	NO. 97-15426
	)	
Plaintiff-Appellant,	)	D.C. Nos.
	)	CV-96-00284-DAE
vs.	)	CV-96-00410-DAE
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MATSON TERMINALS, INC.; MCCABE HAMILTON & RENNY, CO., LTD.; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142; BRUCE GEORGE PERRY; HENRY KREUTZ, JR.; JOHN DOES 1-20; MARY DOES 1-20; DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES 1-20; DOE STATES 1-10; OTHER ENTITIES 1-20,	)	MEMORANDUM
	)	(Filed July 8, 1998)
Defendants-Appellees.	)	

Appeal from the United States District
Court for the District of Hawaii
David A. Ezra, District Judge, Presiding

[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R.36-3.

Argued and Submitted June 9, 1998
San Francisco, California

Before: HALL and THOMAS, Circuit Judges, and WHALEY[2], District Judge.

Quentin Hideyuki Tahara appeals the district court's decision granting summary judgment as to his federal causes of action, and remanding his non-preempted state law claims. After a careful consideration of the record, briefs and oral argument by the parties, we affirm the district court. Because the parties are familiar with the procedural and factual history of this case, we will not recount it here.

I

Tahara's claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO") fails because he does not establish the requisite existence of an associated-in-fact enterprise with "an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity." Chang v. Chen, 80 F.3d 1293, 1295 (9th Cir. 1996). Tahara does not adduce facts to establish that the "Perry Boys" scheme is indeed an enterprise under RICO, neglecting to show that the "Perry Boys" entity has the requisite "mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." Chang, 80 F.3d at 1299. Instead, Tahara characterizes the "Perry Boys" as "an amorphous group," with "a sort of division of levels," including a level for workers who engage in "running away," and other levels for those individuals who "enforce[]" the program against "honest stevedores," and who are members of middle management of the corporate defendants and the ILWU. These references to a "hierarchical relationship" among the defendants are insufficient to

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[2] Honorable Robert H. Whaley, United States District Judge for Eastern Washington, sitting by designation.

establish the necessary decision-making mechanism that an "enterprise" requires. See Chang, 80 F.3d at 1300. Given that Tahara cannot prevail on his RICO theory for failure to establish the existence of an associated-in-fact enterprise, we need not address the other RICO defenses asserted by the defendants.

II

The district court properly held that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempted Tahara's claims against the International Longshoremen and Warehousemen's Union, Local 142 ("Union") for tortious interference with contract, breach of the duty to provide a safe workplace, duty to warn and the duty not to dispatch defendant Perry. Because these claims require interpretation of the applicable collective bargaining agreement and substantially depend upon interpretation of its terms, the Labor Management Relations Act preempts these claims. See Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1147 (9th Cir. 1988).

III

The district court did not err in determining that it lacked jurisdiction over Tahara's remaining state law claims. The district court properly declined to assume admiralty jurisdiction over Tahara's state-law claims. While Tahara's tort claims arise from events that occurred on the Honolulu waterfront, the injuries Tahara asserts implicate no considerations of maritime law. Resolution of his claims hence "does not require the special expertise of a court in admiralty as to navigation or water-based commerce." Sample v. Johnson, 771 F.2d 1335, 1344 (9th Cir. 1985). Nor can Tahara invoke "any federal interest in uniformity of decision requiring the application of federal substantive law" to such torts as assault, battery, forcible restraint, negligent hiring, and negligent supervision, see id.

Because the district court did not clearly err in its factual determination of Tahara's domicile, see Lew v. Moss, 797 F.2d

747, 750 (9th Cir. 1986), we affirm its conclusion that diversity of the parties did not exist. Tahara moved to Arizona only one month prior to commencing this action; his children still live in Hawaii along with their mother; he maintained an active telephone listing; and he retained significant Hawaii contacts. Although he registered to vote in Arizona, and holds an Arizona driver's license, the district court did not clearly err in determining that these links to Arizona were insufficient for Tahara to sustain his burden of proof on residency.

Given the failure of Tahara's RICO claim, as well as the absence of diversity or admiralty jurisdiction, the district court properly exercised its discretion to decline supplemental jurisdiction over Tahara's state-law claims. See Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1102 (9th Cir. 1995).[3]

For these reasons, we affirm the district court's judgment in its entirety.

AFFIRMED

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[3] To the extent that Tahara's state law claims are predicated on the Union's alleged breach of its duty of fair representation, this purported breach, while triggering the application of federal law, see Vaca v. Sipes, 386 U.S. 171, 177 (1967), does not confer exclusive federal jurisdiction, id. at 174.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

QUENTIN HIDEYUKI TAHARA, Plaintiff, vs. MATSON TERMINALS, INC.; MATSON NAVIGATION COMPANY, INC.; McCABE HAMILTON & RENNY, CO., LTD.; INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN'S UNION, LOCAL 142; BRUCE GEORGE PERRY; and HENRY KREUTZ, JR., In Personam; and DOE VESSELS 1-XX, In Rem, JOHN DOES 1-20; MARY DOES 1-10, DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES 2-20; DOE STATES and OTHER ENTITIES 1-20, Defendants.	)	NO. 96-00284 DAE 96-00412 DAE 96-00410 DAE

ORDER CONCERNING DEFENDANT
ILWU'S MOTION FOR CLARIFICATION

Pursuant to Local Rule 220-2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Defendant ILWU's Motion and the supporting and

opposing memoranda, the court clarifies that Count 8 should be treated as a claim for assault or battery, and therefore, it is not preempted or dismissed, but rather it is remanded to state court.

BACKGROUND

The background facts and procedural history of this case have been set forth in great detail in this court's Order Granting Defendants' Motion for Summary Judgment on Federal RICO Claim and Dismissing Without Prejudice All Remaining Claims for Lack of Subject Matter Jurisdiction filed on February 20, 1997 ("February 20, 1997 Order") and this court's Order Regarding Plaintiff's Motion for Reconsideration filed on April 30, 1997 ("April 30, 1997 Order"). They will not be repeated here.

In Defendant ILWU's instant motion, it seeks clarification as to whether Count 8 of Plaintiff's First Amended Complaint has been dismissed. As an initial matter, the counts in Plaintiff's First Amended Complaint were misnumbered. For instance, Count 7 was actually Count 6 and Count 8 was actually Count 7. Rather than address Plaintiff's claims by number, the court addressed them by causes of action. Assuming that Defendant ILWU is referring to what Plaintiff labeled as Count 7, but was actually Count 8, this court will clarify.

Count 8 states as follows:

> 102. KREUTZ, and therefore, the ILWU-142 and MCCABE, intentionally engaged in the lawful act of finding out who reported to MATSON TERMINALS that PERRY had "run away;" 103. KREUTZ, and therefore the ILWU-142 and MCCABE, intentionally engaged in the lawful act of finding out who reported to MATSON TERMINALS that PERRY had "run away." They did so with the intent to cause injury to TAHARA.

104. KREUTZ, and ILWU-142 and MCCABE did in fact cause injury to Tahara by engaging in this otherwise lawful act.
105. KREUTZ and the ILWU-142 and MCCABE did not have any justification or had insufficient justification for their act of discovering the identity of TAHARA as the "Whistle Blower" and then revealing his identity to TAHARA.

Although labeled as a "prima facie tort" the court notes first that the language in those paragraphs do not support a cause of action for any tort under Hawaii law. Rather, those paragraphs appear to simply state facts in support of other causes of action in previous paragraphs in the complaint. Nevertheless, Defendant ILWU claims that because Count 8 closely resembles Plaintiff's claim for intentional interference with prospective economic advantage the court should clarify that Count 8 is likewise dismissed.

Plaintiff explains to the court that Count 8 is "an intentional tort involving the intent to inflict physical injury on Plaintiff." Reply at 2. In other words, by Plaintiff's own admission, Count 8 is a claim for assault or battery. There is no other intentional tort under Hawaii law involving intent to inflict physical injury. Relying upon Plaintiff's representation that this is what Plaintiff actually intended, the court finds that Count 8 merely alleges facts in support of Counts 1 and 2. Thus, Count 8 is an extension of his assault and battery claims and should be treated as such. Therefore, Count 8 is not preempted or dismissed, but rather it is remanded for the reasons stated in this court's April 30, 1997 Order.

CONCLUSION

For the reasons stated above, as Count 8 should be treated as a claim for assault or battery, the court clarifies that Count 8 is not preempted or dismissed, but rather it is remanded to state court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 1 1997.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT COURT

Quentin Hideyuki Tahara vs. Matson Terminals, Inc., et al., Civil Nos. 96-00284 DAE, 96-00412 DAE, 96-00410 DAE; ORDER CONCERNING DEFENDANT ILWU'S MOTION FOR CLARIFICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

QUENTIN HIDEYUKI TAHARA,	)	NO. 96-00284 DAE
	)	96-00412 DAE
Plaintiff,	)	96-00410 DAE
	)	
vs.	)	
	)	
MATSON TERMINALS, INC.; MATSON NAVIGATION COMPANY, INC.; McCABE HAMILTON & RENNY, CO., LTD.; INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN'S UNION, LOCAL 142; BRUCE GEORGE PERRY; and HENRY KREUTZ, JR., In Personam; and DOE VESSELS 1-XX, In Rem, JOHN DOES 1-20; MARY DOES 1-10, DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES 2-20; DOE STATES and OTHER ENTITIES 1-20,	)	
	)	
Defendants.	)	
	)	

ORDER REGARDING PLAINTIFF'S
MOTION FOR RECONSIDERATION

Pursuant to Local Rule 220-2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Plaintiff's Motion for Reconsideration and the

supporting and opposing memoranda, the court MODIFIES the February 20, 1997 Order and DISMISSES Plaintiff's Claims for Duty to Provide a Safe Workplace, Duty to Warn, Duty to Dispatch, Interference with Prospective Advantage, and State RICO claims against ILWU WITH PREJUDICE, REMANDS Plaintiff's Remaining State Claims to State Court and DENIES Plaintiff's Request for Certification.

BACKGROUND

The background facts of this case were fully set forth in this court's Order Granting Defendants' Motion for Summary Judgment on Federal RICO Claim and Dismissing Without Prejudice All Remaining Claims for Lack of Subject Matter Jurisdiction, filed on February 20, 1997 ("February 20, 1997 Order"). Those facts need not be repeated in order to address Plaintiff's motion for reconsideration. The procedural history relevant to the instant motion are as follows.

On March 18, 1996, Plaintiff Quentin Hideyuki Tahara ("Plaintiff") filed a Complaint in the United States District Court for the District of Hawaii. The case was assigned to this court. On March 22, 1996, Plaintiff filed a Complaint in the Circuit Court of the First District of Hawaii. On May 1, 1996, Defendant International Longshoremen and Warehousemen's Union Local 142 ("ILWU") and Defendant Matson Terminals, Inc., et al., ("Matson"), removed the case from the Circuit Court to the U.S. District Court. These Defendants based removal on both diversity jurisdiction and federal question jurisdiction created by Plaintiff's RICO claim. The removed case was referred to District Judge Samuel P. King. That same day, Defendant McCabe Hamilton and Renny, Co., Ltd. ("McCabe") also removed the case to the district court. Defendant McCabe likewise based subject matter jurisdiction on Plaintiff's RICO allegations, and diversity jurisdiction. That removed action was assigned to District Judge Helen Gillmor. On June 5, 1996, all parties filed a stipulation to consolidate all

three cases. The consolidated case was then assigned to this court.

On August 1, 1996, Defendant Matson filed a Motion for Summary Judgment. On August 9, 1996, Defendant ILWU filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Defendant McCabe filed a motion for partial summary judgment on October 16, 1996. Plaintiff filed a cross motion for summary judgment on November 5, 1996. On February 25, 1997, this court filed the February 25, 1997 Order, which granted Defendants' motion for summary judgment on the federal RICO claim.

In the February 25, 1997 Order, this court found that § 1333 jurisdiction over Plaintiff's admiralty tort claims was lacking and accordingly dismissed those claims. The court also found that Plaintiff failed to demonstrate that the losses for which he requested recovery were losses to business or property as contemplated by RICO, and because Plaintiff lacked standing to pursue a federal RICO claim, the court granted Defendants' Motion for Summary Judgment on that issue. In addition, the court found that based upon the available evidence complete diversity did not exist between the parties, therefore, subject matter jurisdiction was lacking. Consequently, Plaintiff's only bases for jurisdiction, diversity and federal question based on RICO and admiralty, were absent. The court declined to assert supplemental jurisdiction over Plaintiff's state tort and RICO claims, and dismissed them for want of jurisdiction. Moreover, the court did not reach the merits of ILWU's motion to dismiss, or McCabe' s motion for partial summary judgment as all of Plaintiff's remaining claims were dismissed for lack of subject matter jurisdiction.

On February 28, 1997, Plaintiff filed a Motion for Reconsideration, or in the Alternative for Certification Under Rule 54(b), or Remand to State Court. On March 12, 1997, Plaintiff filed a Notice of Appeal to the Ninth Circuit Court of

Appeals.[1] On March 13, 1997, Defendant McCabe filed a Memorandum in Opposition to Plaintiff's Motion for Reconsideration.[2] On March 14, 1997, Defendant Matson filed a Memorandum in Opposition to Plaintiff's motion for reconsideration.[3] On March 17, 1997, ILWU filed a Response to Plaintiff's Motion for Reconsideration. Plaintiff filed a Reply to Defendants' Oppositions on March 24, 1997, and on March 26, 1997, he filed a supplemental affidavit in support of his motion.

STANDARD OF REVIEW

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. Sheet Metal Workers' Int'l Ass'n Local Union. No. 359 v. Madison Indus., Inc., 84 F.3d 1186, 1192 (9th Cir. 1996). There is a "compelling interest in the finality of judgments which should not be lightly disregarded." Rodgers v. Watt, 722 F.2d 456, 459 (9th Cir. 1983).

A district court has discretion to decline to consider an issue raised for the first time in a motion for reconsideration. Self-

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[1] "A notice of appeal after announcement or entry of the judgment but before disposition of any of the above motions [50(b), 5.2(b), 59...] is ineffective to appeal from the judgment or order, or part thereof, specific in the notice of appeal, until the entry of the order disposing of the last such motion outstanding." Fed.R.App.P. 4(a)(4). At the time of Plaintiff's appeal, this court had not issued an order disposing of the last such motion – the instant motion for reconsideration. Because Plaintiff's appeal was ineffective, this court retains jurisdiction.

[2] Defendant Henry Kreutz filed a Joinder in McCabe's Memorandum in Opposition on March 14, 1997.

[3] Defendant Henry Kreutz filed a Joinder in Matson's Memorandum in Opposition on March 17, 1997.

Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 912 (9th Cir. 1995).

It is well settled in the Ninth Circuit that a successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Great Hawaiian Financial Corp. v. Aiu, 116 F.R.D. 612, 616 (D. Hawaii 1987) (citations omitted), rev'd on other grounds, 863 F.2d 617 (9th Cir. 1988). Courts have established only three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice. Id. The District of Hawaii has implemented these standards in Local Rule 220-11.

DISCUSSION

Although Plaintiff does not so state in his motion, he apparently bases his motion on the third criterion, the need to correct manifest error of law or fact, or to prevent manifest injustice. Plaintiff makes his motion on several grounds: (1) Plaintiff experienced a deprivation of his Thirteenth Amendment freedoms against involuntary servitude, constituting injury under RICO; (2) diversity jurisdiction was proper because Plaintiff can prove Arizona citizenship through his Arizona driver's license and voter registration; (3) if reconsideration of the RICO claim is denied, certification of the RICO issue is proper; and (4) if the motion is denied entirely, the case should be remanded to State court.

I. RICO Injury

In his motion for reconsideration, Plaintiff quotes the Thirteenth Amendment, arguing that he was subjected to

involuntary servitude because he was forced to do the work of other employees against his will. Plaintiff claims that this court erred in determining that Plaintiff's alleged involuntary servitude did not constitute economic injury for purposes of RICO analysis. However, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat . . . of coercion through law or the legal process." United States v. Kozminski, 487 U.S. 931, 952 (1988); see Brogan v. San Mateo County, 901 F.2d 762, 764 (9th Cir. 1990) (state work program encouraged employment and did not violate the Thirteenth Amendment because person had alternative to performing labor).

First, Plaintiff claims that he was required to perform the work of others under the threat of bodily harm. However, he fails to demonstrate how he was forced to work by the use or threat of coercion because he claims that "these damages . . . occurred prior to any damages Tahara might have suffered as the result of the beating by Bruce Perry." Motion at 2 (emphasis added). Moreover, Plaintiff does not contend that he was forced to work without pay, for reduced pay, or even that he was not paid overtime for any overtime work he performed. "[I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers." United States v. Mussry, 726 F.2d 1448, 1451 (9th Cir. 1984) (quoting Pollock v. Williams, 322 U.S. 4, 17-18, (1944)).

Notwithstanding this, Plaintiff mischaracterizes and belittles the meaning and history behind the Thirteenth Amendment with his argument that involuntary servitude is not a "personal" injury. To support the claim that he has standing under RICO, Plaintiff ineffectively argues that involuntary servitude is merely an economic injury. The lengthy history and purpose behind the amendment demonstrate otherwise. See United States v. Kozminski, 487 U.S. 931, 942 (1988) ("[t]he primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the

time of the Civil War, but.the Amendment was not limited to that purpose."); Williams v. City of New Orleans, 729 F. 2d 1554, 1578 (5th Cir. 1984) (Wisdom, J., concurring and dissenting) (abolition of slavery was intended to create universal civil freedom); Steirer v. Bethlehem Area School District, 789 F. Supp. 1337, 1342 (D. Penn. 1992) (finding intent of Thirteenth Amendment was to abolish slavery in all forms and all its badges and incidents); Boblin v. Board of Education, 403 F. Supp. 1095 (D. Hawaii 1975) (certain forms of servitude do not violate the dictates of the Thirteenth Amendment). Commonwealth of Pennsylvania v. Local Union No. 542, 347 F. Supp. 268, 300 (E.D. Penn. 1972) ("Thirteenth Amendment was not merely abolishing the physical cruelties of slavery, but its purpose was to also eradicate those 'badges and incidents of slavery.'")

Not only has Plaintiff utterly failed to demonstrate any manifest error of law or fact regarding his federal RICO claim, but Plaintiff has not given this court any justifiable basis to reconsider its prior order on this issue.

II. Diversity Jurisdiction

Plaintiff apparently dislikes the fact that the court sue sponte raised the issue of whether diversity jurisdiction existed in this case. However, it is clear that if a question of jurisdiction is not raised by the parties, a court is to raise the lack of subject matter jurisdiction on its own motion. See Fed. R. Civ. P 12(h)(3); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); Sinclair v. Spatocco, 452 F.2d 1213, 1213 (gth Cir. 1972), cert. denied, 409 U.S. 886 (1972) ("trial court has discretion to determine jurisdictional facts itself"). In addition, a party's concession to diversity jurisdiction is not determinative that such jurisdiction exists. Sinclair, 452 F.2d at 1213; United Food and Commercial Workers Union v. Centermark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2nd Cir. 1994). This court raised the question of jurisdiction because it appeared from the

record that complete diversity did not exist in this case. See February 25, 1997 Order at 14-15. The burden of proof is on the party asserting jurisdiction to support its allegations with competent proof. United Food, 30 F.3d at 301.

A. Removal Jurisdiction

Defendants based removal jurisdiction on diversity and a federal question raised by Plaintiff's federal RICO claim. The court notes first that Defendants did not properly remove based on diversity. It is a well-settled point of law that there are two limitations to removal of diversity cases: (1) none of the defendants may be a citizen of the state in which the district court is located, and (2) diversity must exist at the time the original action was filed as well as at the time the petition for removal is filed. Kaneshiro v. North American Co. for Life and Health Ins., 496 F. Supp. 452 (D. Hawaii 1980). Because Matson, McCabe and ILWU were and are citizens of the State of Hawaii, removal on diversity grounds is precluded. In addition, after an examination of Plaintiff's RICO claim demonstrated that jurisdiction could not be based upon that claim, the court concluded that Defendants' removal on either of these bases was flawed.

B. Complete Diversity

Notwithstanding Defendants' faulty removal, Plaintiff claims that complete diversity exists. He asserts that he is not a Hawaii citizen, but rather, a citizen of Arizona. Citizenship is determined by an individual's domicile, and a person is domiciled in a location where he has established a "fixed habitation or abode in a particular place, and [an intent][4] to

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[4] The key to domicile is the intent element. Carter v. McConnel, 576 F.Supp. 556, 558 (D.Nev. 1983). However, intent should be distinguished from "motive." A motive for one's domicile is irrelevant unless it bears on the issue of intent. Williamson v.

remain there permanently or indefinitely." Lew v. Moss, 797 F.2d 747, 749-50 (9th Cir. 1986). However, there is a presumption in favor of an established domicile as opposed to a newly acquired one. Id. at 751; see also Duff v. Beaty, 804 F. Supp. 332, 335 (N.D. Ga. 1992) ("presumption exists against a newly acquired domicile and in favor of the 'old' domicile."). The burden of proof for one seeking to establish a change in domicile is a heavy one. White v. All America Cable and Radio, Inc., 642 F. Supp. 69, 72 (D.P.R. 1986) (plaintiff who claims to have changed domiciles bears a heavy burden). A plaintiff must produce enough evidence to substantiate claim of a change in domicile to withstand a directed verdict. Lew, 797 F.2d at 751.

However, the Ninth Circuit has found that several factors must be considered in determining a party's domicile for purposes of establishing citizenship: (1) current residence; (2) voting registration and voting practices; (3) location of personal and real property; (4) location of brokerage and bank accounts; (5) location of spouse and family; (6) membership in unions and other organizations; (7) place of employment or business; (8) driver's license and automobile registration; (9) and payment of taxes. Id. at 750. In situations involving a party who has recently changed residence, courts often look to objective indicia of intent. Id. Such cases usually involve an individual who has recently moved from one state to another without establishing ties to the new state or cutting previous ones. Abott v. United Venture Capital, Inc., 718 F. Supp. 823, 826 (D. Nev. 1988).

Plaintiff claims that his Arizona driver's license and voter registration effectively prove that his domicile is Arizona for purposes of diversity jurisdiction. This is the only evidence

Osenton, 232 U.S. 619, 625 (1914); Heinz v. Havelock, 757 F.Supp. 1076 (C.D. Ca. 1991) (motive for change in domicile is irrelevant if move and intent to remain are bona fide.)

produced by Plaintiff.[5] Plaintiff has not argued that his automobile registration, bank accounts, family location, location of job, union membership or other indicators demonstrate Arizona citizenship. Taken together, these factors would be indicative of an intent to remain in Arizona. On the contrary, Defendant McCabe has come forth with evidence negating indications that Plaintiff has such an intent.

This suit was filed on March 18, 1996. Apparently, Plaintiff made several conveyances of real property on the day of and months after the suit was filed. For the purposes of those conveyances, Plaintiff listed the Honolulu address he has had for years. See Memo in Opp. at 6; Exhibits "A-F". In addition, the 1996-1997 telephone directory lists Plaintiff at the 1028 Matzie Lane address. Id. Apparently, the telephone number listed for his Honolulu address is still operative. Id.

In response, Plaintiff argues that he moved to Arizona under protective custody because of "the danger that I'm in due to me trying to convict the person that assaulted me March 30, 1996 . . ." See Reply, Exhibit "B." He further states that "I would not return my permanent residence to Hawaii even if I was not under protective custody as I do not intend to live in a place where my personal safety is threatened." See id., Tahara Affidavit at 2. However, the question is not whether Plaintiff intends to move back to Hawaii, but rather, whether he intends to remain in Arizona. A party who undergoes a change in residence involuntarily or by constraint, as a general rule, retains the prior domicile. Stifel v. Hopkins, 477 F.2d 1116, 1121 (6th Cir. 1973). A person cannot be said to have acquired a domicile of choice in a place if located there by virtue of

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[5] The court finds validity in McCabe's argument that the driver's license and voter registration should be considered superficial because they are easy to create at little expense or inconvenience. Memo in Opp. at 5; Leon v. Caribbean Hosp. Corp., 848 F.Supp. 317, 318 (D.P.R. 1994).

physical compulsion. Id.; Hiramatsu v. Phillips, 50 F. Supp. 167, 168 (S.D. Cal. 1943); see e.g.; Wendel v. Hoffman, 24 F. Supp. 63 (D.C.N.J. 1938) (material witness under protective custody did not change domicile when relocated to different state). Therefore, if Plaintiff was, in fact, forced to relocate under protective custody for fear of his safety pending his testimony in the criminal trial, he has not evidenced an intent to make Arizona his domicile.[6] This court finds no reason to reconsider the previous ruling that subject matter jurisdiction based on diversity is lacking.

III. Complete Preemption

In Defendant ILWU's response to Plaintiff's Motion for Reconsideration, it argues that the court has subject matter jurisdiction over Plaintiff's state law claims because they are preempted by § 301 of the LMRA.[7] In ILWU's Motion to Dismiss filed on August 9, 1996, it argued as a defense that Plaintiff's state law claims should be dismissed because they were preempted by § 301 of LMRA. Presumably, because ILWU believed that removal was proper under Plaintiff's RICO claim and diversity jurisdiction, it never before raised the question of subject matter jurisdiction based on preemption of

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[6] Although Plaintiff asserts that the decision to relocate to Arizona was his own, such representations carry little weight. Lew, 797 F.2d at 750 ("statement of intent are entitled to little weight when in conflict with facts."). Moreover, "[i]ntent, which is of its very nature voluntary cannot co-exist with compulsion." Stifel, 447 F.2d at 1121.

[7] Plaintiff contends that because Defendant did not file a motion for reconsideration itself, its arguments should not be considered by the court. In the alternative, Plaintiff requests that the court review Plaintiff's response to Defendant's earlier motion to dismiss where the issues were previously raised. The court chooses the latter.

Plaintiff's state law claims.[8] Because the preemption issue concerns whether this court may properly exercise subject matter jurisdiction in this case, the court will address the argument.

Defendant ILWU contends that the instant case falls within the federal question jurisdiction of this Court, as the case "arises under" federal law, within the meaning of 28 U.S.C. § 1331.[9] Under the "well-pleaded complaint rule," a case arises under federal law only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987); Whitman v. Raley's, Inc., 886 F.2d 1177, 1180 (9th Cir. 1989). A defendant's assertion that federal law preempts the plaintiff's state law claims does not ordinarily give rise to federal question jurisdiction. Because preemption is a defense, it does not appear on the face of the plaintiff's well-pleaded complaint. Caterpillar, 482 U.S. at 393; Whitman, 886 F.2d at 1180.

An exception to the above principles applies when Congress "so completely pre-empt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Taylor, 481 U.S. at 63-64; Buster v.

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[8] As the Ninth Circuit explained in Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 997 (9th Cir. 1987), "[e]ven when federal law preempts state law, a state law claim may not be removed unless federal law also supplants it with a federal claim."

[9] Title 28 U.S.C. § 1331 provides:

§ 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Greisen, 104 F.3d 1186, 1188 (9th Cir. 1997). State law claims falling within this category are removable to federal court. Taylor, 481 U.S. at 66-67.

In the instant case, beyond Plaintiff's statutory claims of RICO and LHWCA, Plaintiff asserted only state law tort claims. Defendant ILWU's assertion that section 301 preempts certain of these claims is insufficient, without more, to invoke the court's federal question jurisdiction. Defendant ILWU must establish that section 301 "completely preempts" Plaintiff's claims.

To determine whether section 301 preempts the state law claim the court must inquire whether "application of state law 'requires the interpretation of a collective bargaining agreement' or 'substantially depends upon analysis of the terms of an agreement made between the parties in a labor contract.'" Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1147 (gth Cir. 1988) (citations omitted). However, if the state claim "'confers nonnegotiable state-law rights on employers or employees independent of any right established by contract,' the claim is not preempted. A state law claim is independent for the purposes of Section 301 if 'resolution of . . . [it] does not require construing the collective bargaining agreement.' However, if 'evaluation of the . . . claim is inextricably intertwined with consideration of the terms of the labor contract,' it is preempted and may be removed to federal court." Hyles v. Mensing, 849 F.2d 1213, 1216 (9th Cir. 1988) (citations omitted). See also, Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987).

A. Intentional Tort and Emotional Distress Claims

Plaintiff repeatedly cites Hayden v. Reickerd, stating that his intentional tort claims are based on the "atmosphere of intimidation and violence created and fostered by the Union which were wrongful and could in no manner arise out of or relate to the Collective Bargaining Agreement." Memo in Reply

at 4. In Hayden, the plaintiff asserted two distinct causes of action, battery and retaliation for union activities. The court stated that "[w]hatever the parties' rights and duties under their collective bargaining agreement, they could not possibly have negotiated infringement of Hayden's state law right to be free from battery." Hayden, 957 F.2d 1509. The court based its decision on the premise that the battery claim rested on a nonnegotiable state right which did not turn on an interpretation of the collective bargaining agreement ("CBA"). Id.

Moreover, Plaintiff cites Lingle v. Magic Chef, Norge Division, 486 U.S. 399 (1988) in support of his argument. Lingle concerned a retaliation claim in which the plaintiff sued her employer, alleging a cause of action under state tort law that she had been discharged from her employment because she filed a workers' compensation claim. The Supreme Court held that the claim was not preempted by § 301 even though there was a CBA which forbade discharge for other than just cause.

The rationale behind both decisions was that a CBA cannot authorize intentional wrongdoings such as a battery or retaliatory discharge committed by the union. In this case, the State of Hawaii has an interest in protecting the public from torts such as assault and battery, independent of the employment relationship.

As did the courts in Hayden and Lingle, this court similarly finds that Plaintiff's state law claims of assault, battery, and false imprisonment concern conduct not of the type regulated by the CBA, and hence those claims are not preempted.[10] Moreover, the court finds that Plaintiff's claims

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[10] The court will note that ILWU has not argued that Plaintiff's assault and battery claims are preempted. With respect to Plaintiff's intentional tort claims, ILWU argues only that the claims of interference with prospective advantage and intentional infliction of emotional distress are preempted.

of intentional and negligent infliction of emotional distress are not preempted to the extent that they arose from the same aforementioned intentional conduct which is not covered by the CBA. See Young, 830 F.2d at 1002 (citing Tellez v. Pacific Gas & Elec., Co., 817 F.2d 536, 539 (9th Cir. 1987) (emotional distress claims not preempted because they arose from conduct not covered by the collective agreement)).

As for Plaintiff's claim for interference with prospective advantage, he argues that by reporting his identity to Perry, knowing that it would sustain an adverse effect on his economic interest in continuing to work, Defendants interfered with his prospective advantage.

The CBA requires that any disciplined employee be told "the reason for his discipline or discharge in writing," and gives disciplined employees rights to due process in pursuing a grievance. Motion to Dismiss at 7; Longshore Agreement §§ 16.01, 25.07. Therefore, depending upon the interpretation of the CBA, ILWU's reporting of Plaintiff's identity may have been mandated by its own terms. The court finds that Defendant ILWU's reporting of Plaintiff's identity is inextricably intertwined with the CBA as it governs the union's obligations to its members in the context of disciplinary matters. Therefore, Plaintiff's claim for interference with prospective advantage is preempted by § 301. The court finds however, that none of Plaintiff's other intentional tort claims and emotional distress claims are preempted.

B. Duty to Provide a Safe Workplace

Defendant ILWU argues that the duty to provide a safe workplace is preempted. ILWU contends that under Hawaii law, labor unions have no duty to provide a safe workplace and consequently, any duty ILWU has to provide a safe workplace would have to be assumed within the CBA.

It is true that under Hawaii law, only employers are obligated to provide a safe workplace. Michel v. Valdastri, Ltd., 59 Haw. 53, 56 (1978). In Electrical Workers v. Hechler, a plaintiff alleged that her union had a duty to ensure a safe workplace. The Court noted that such a duty was one without existence independent of the CBA because unions were not obligated to provide a safe workplace under Florida common law. The Court found that resolution of the tort claim would require a court to determine whether the CBA in fact placed an implied duty of care on the union, and the nature and scope of that duty. Hechler, 481 U.S. 851 (1987). Therefore, the tort claim was not found to be independent of the CBA.

In the instant case, Plaintiff cannot assert that Hawaii law imposes upon labor unions a duty to provide a safe workplace. Any such duty, if it exists, would have to be assumed by the union ln the CBA. Because this claim is not independent of the CBA, and would require its interpretation to determine the applicability of a duty to provide a safe workplace, this court finds that it is preempted by § 301.

C. Duty to Warn

ILWU correctly argues that Hawaii does not recognize a general duty to warn others of harm. Cuba v. Fernandez, 71 Haw. 627, 632 (1990). A party only has a duty to warn another of harm if a special relationship exists between them. Id. Hawaii law imposes a duty to warn in relationships between: (1) common carriers and their passengers: (2) innkeepers and their guests; (3) landowners who hold their property out to the public and their guests; and (4) one who is required by law to take or who voluntarily takes the custody of another and the person under his custody. Id. Plaintiff does not assert that any of these special relationships governed by Hawaii law exist, and because Hawaii law does not impose such a duty on the union, any duty, if 20 it exists, would have to be assumed under the CBA. Similar to Plaintiff's claim for duty to provide a safe workplace,

his claim for duty to warn is not independent of the CBA, and it is therefore preempted by section 301.

D. Duty not to Dispatch Perry

Plaintiff argues that ILWU had a duty not to dispatch Perry to the job "because he was a known incompetent and unfit employee because of uncontrolled violent tendencies." First Amended Complaint at 30 % 176. Plaintiff insists that ILWU's failure to discharge or transfer Perry to protect other union members was a breach of its duty to Plaintiff.

Under Hawaii law, unions do not owe a duty of care to screen employees. Janssen v. American Hawaii Cruises, 731 P.2d 163, 166 (Haw. 1987). In Janssen, the Hawaii Supreme Court held that the union had no duty to screen an employee who sexually assaulted a co-worker, even where the union knew that he was a convicted felon, and still referred him for the position.

In the instant case, Plaintiff argues that ILWU had a duty to determine that Perry was dangerous and should have "discharged or transferred" Perry to protect other union members. In other words, Plaintiff seeks to impose a duty upon ILWU to screen union members prior to dispatch. Hawaii imposes no such duty, however, the CBA governs the responsibilities for dispatching and hiring employees. Motion to Dismiss at 9 n.5. It appears that even under the CBA, the employer bears the responsibility for hiring and dispatch. Id. Because Hawaii law does not impose a duty upon unions co screen employees, such a duty, if it exists, would be imposed by the CBA. The court likewise finds that Plaintiff's "duty not to dispatch" claim is preempted under section 301.

E. State RICO Claim

Plaintiff's state RICO claim is based upon his allegation that ILWU and other Defendants engaged ln a practice of

"running away," in which longshore workers left the job-sites in order to be paid for work not performed. In order to sustain a claim under RICO a plaintiff must demonstrate conduct of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c). However, where the predicate acts underlying a RICO claim are founded on the provisions of a CBA, or are substantially dependent upon an analysis of the CBA, the RICO claim must be dismissed as preempted. Hubbard v. United Airlines, Inc., 927 F.2d 1094, 1097 (9th Cir. 1991) (finding RICO claim preempted where plaintiff based her RICO claims on predicate acts that involved violation of a right created by the CBA).

Section 8.01 of the CBA provides:

> Six (6) hours shall constitute a day's work. . . . However, an employee may leave his job for good and sufficient cause providing he first reports his intention to leave and his reasons for leaving to his foreman and continues with his work until his assigned replacement arrives.

Moreover, section 13.01 of the CBA permits the company to waive the need for a replacement. Reply Memo at 9. Thus, the express provisions of the CBA permit employees to leave the job site, on occasion and receive pay for a particular shift. Because the predicate acts underlying the RICO claim are rights created by the CBA, the claim is inextricably intertwined with the provisions of the CBA. As such, the court finds that Plaintiff's state RICO claim is preempted by section 301.

F. Federal Question Jurisdiction

The court finds that the complete preemption of Plaintiff's claims alleging: duty to provide a safe workplace, duty to warn, duty not to dispatch, interference with prospective advantage, and state RICO claim, confers federal question jurisdiction upon this court. Although neither the Plaintiff nor

any of the Defendants asserted subject matter jurisdiction based upon the doctrine of complete preemption, the court finds that such jurisdiction existed due to Plaintiff's preempted claims. See Brockman v. Merabank, 40 F.3d 1013, 1017 (9th Cir. 1994) (finding that federal courts retain subject matter jurisdiction even after basis for removal is dismissed if a federal question remains).

G. Dismissal of Preempted Claims

In certain instances, state law claims which are removable as preempted under section 301 may later be dismissed for the plaintiff's failure to exhaust contractual grievance procedures. See Olquin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984), overruled on other grounds by, Vicent v. Trend Western Technical Corp., 828 F.2d 563 (9th Cir. 1987). In fact, "[c]ollective bargaining agreements customarily provide for grievance and arbitration procedures, and unless an employee can show that he was not fairly represented by his union, grievance and arbitration is the employee's exclusive remedy for breach of the agreement." Id. at 1472.

In the instant case, ILWU sought 12(b)(6) dismissal based on preemption of Plaintiff's state law claims because "[Plaintiff] has ignored the remedies under the Union Constitution and by-laws." Plaintiff has not disputed this fact. Because Plaintiff has not exhausted his contractual remedies, and he has not alleged that ILWU breached its duty of fair representation, "he therefore cannot maintain a section 301 suit independent of the procedural requirements of the collective bargaining agreement." See Olguin, 740 F.2d at 1476.

In Dielsi v. Falk, 916 F. Supp. 985 (C.D. Cal. 1996), a district court dismissed without prejudice state law claims which were completely preempted by federal copyright law as remand to state court would be meaningless because federal courts have exclusive jurisdiction over copyright claims. The court followed

the logic, of other courts which dismissed without prejudice state law claims completely preempted by ERISA when the plaintiffs' remedies had not been exhausted.[11] Id. at 994-95. However, in the instant case, exhaustion would be futile because the statute of limitations has run on Plaintiff's section 301 claims, rendering them time-barred. See DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 170-72 (1983) (six-month statute of limitations governing section 301 claims). Nevertheless, this court cannot simply ignore the statute of limitations by addressing the merits Plaintiff's section 301 claims. Thus, because exhaustion would be futile, this court has no choice but to DISMISS Plaintiff's preempted claims WITH PREJUDICE.

Because the court dismisses Plaintiff's preempted LMRA claims with prejudice, his remaining state law claims are hereby REMANDED to state court pursuant to 28 U.S.C. § 1367(c)(3) (supplemental jurisdiction over state claims is discretionary if original federal claim ls dismissed).[12]

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[11] The court notes that the Dieisl court stated that "If exhaustion is not futile, a federal court will refrain from exercising jurisdiction on ripeness grounds and dismiss the preempted ERISA claim without prejudice." Id. at 994 (emphasis added).

[12] Remands to state court are governed by 28 U.S.C. § 1447(c) which provides:

> If at any time before final judgment lt appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of removal.

As this order concerning Plaintiff's Motion for Reconsideration constitutes final judgment ln this case, remand is proper.

IV. Admiralty Jurisdiction

As an afterthought in his reply to Defendants' opposition, Plaintiff argues that the issue of admiralty jurisdiction was incorrectly decided. Plaintiff did not raise this in his motion for reconsideration, nor was the argument raised in response to an argument made by any of the Defendants.

Local Rule 220-4 provides as follows. "A reply must respond only to arguments raised in the opposition. Any arguments raised for the first time In the reply shall be disregarded." L.R. 220-4. Plaintiff clearly disregarded the mandate of this rule, and as such, the court sees no reason to revisit Plaintiff's contention.[13]

V. Certification

Plaintiff requests certification of the RICO question under Rule 54(b), in the event that the court finds diversity jurisdiction but denies the RICO claim. Because the court finds diversity to be lacking In this case, Plaintiff's request for certification is DENIED.

CONCLUSION

For the reasons stated above, the court MODIFIES the February 20, 1997 Order and DISMISSES Plaintiff's Claims for Duty to Provide a Safe Workplace, Duty to Warn, Duty to

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[13] The court will nevertheless note that Plaintiff's admiralty argument Is entirely without significance. This court did cite the case of Owens-Illluols Inc. v. United States Dist. Court, 698 F.2d 967, 970 (9th Cir. 1983), however, the February 20, 1997 Order focused upon whether Plaintiff's tort claims had sufficient "maritime flavor" to invoke admiralty jurisdiction. Plaintiff's argument is wholly without merit as he cannot demonstrate that his state tort claims have even a minuscule "maritime flavor."

Dispatch, Interference with Prospective Advantage, and State RICO claim against ILWU WITH PREJUDICE, REMANDS Plaintiff's Remaining State Claims to State Court and DENIES Plaintiff's Request for Certification.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, APR 30 1997.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT COURT

Quentin Hideyuki Tahara vs. Matson Terminals, Inc., et al., Civil Nos. 96-00284 DAE, 96-00412 DAE, 96-00410 DAE; ORDER REGARDING PLAINTIFF'S MOTION FOR RECONSIDERATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

QUENTIN HIDEYUKI TAHARA,	)	NO. 96-00284 DAE
	)	96-00412 DAE
Plaintiff,	)	96-00410 DAE
	)	
vs.	)	
	)	
MATSON TERMINALS, INC.; MATSON NAVIGATION COMPANY, INC.; McCABE HAMILTON & RENNY, CO., LTD.; INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN'S UNION, LOCAL 142; BRUCE GEORGE PERRY; and HENRY KREUTZ, JR., In Personam; and DOE VESSELS 1-XX, In Rem, JOHN DOES 1-20; MARY DOES 1-10, DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES 2-20; DOE STATES and OTHER ENTITIES 1-20,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON FEDERAL RICO CLAIM AND DISMISSING WITHOUT PREJUDICE ALL REMAINING CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Local Rule 220-2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Defendants' motions and the supporting and opposing memoranda, the court GRANTS Defendants' Motion for Summary Judgment on the federal RICO claim and DISMISSES WITHOUT PREJUDICE all remaining claims for lack of subject matter jurisdiction.

BACKGROUND

Plaintiff Quentin Hideyuki Tahara ("Plaintiff") and Defendant Bruce Perry ("Perry") were members of the International Longshoremen and Warehousemen's Union Local 142 ("ILWU"), and were employed by Defendant McCabe, Hamilton & Renny Co. ("McCabe"), a labor contractor operating on the Honolulu waterfront. Defendant McCabe contracts with Defendant Matson Terminals ("Matson") to provide Matson with workers to load and unload ships, and McCabe in turn has a collective bargaining agreement with ILWU to provide workers for Matson and other companies.

While working for McCabe, Plaintiff observed what he believed to be a longstanding practice of longshore workers "running away" from job sites in order to be paid for work not performed.

On March 10, 1994, while Plaintiff was working for McCabe at a Matson terminal, he observed Perry arrive at the job site for work and leave without permission from the supervisor. He confidentially reported this observation to employees at Matson, who in turn reported it to McCabe. Perry's pay was docked as a result.

The ILWU and Defendant Henry Kreutz, Jr. ("Kreutz"), a McCabe employee and union representative for ILWU, allegedly "used the authority and power of the union to learn who reported Perry of [Plaintiff's] identity." Kreutz confronted Plaintiff in a hostile manner, reprimanded him for reporting

Perry's actions and told him that Perry was on an "excusable leave."

On March 30, 1994 Perry allegedly accosted Plaintiff in the Pier 52 parking lot at the Matson Terminal, and demanded to know why Plaintiff had caused Perry's pay to be docked. In the ensuing "fray" Perry assaulted Plaintiff. In assaulting Plaintiff, Perry allegedly believed he was the agent of his employer McCabe and ILWU because Perry intended his actions in part to benefit McCabe and ILWU by enforcing the "running away" practice. After the assault, ILWU and the other Defendants purportedly ratified and condoned the assault by continuing to employ Perry and by paying him double time for the shift in question.

Plaintiff subsequently filed a Complaint against all of the Defendants, setting forth 24 separate counts on March 18, 1996, and an amended complaint on March 27, 1996.

Counts 1 through 10 are for what are alleged to be "intentional torts," including assault, battery, false imprisonment, intentional infliction of emotional distress, and intentional interference with economic advantage. In addition, Plaintiff alleges "respondeat superior" liability of the union for the actions of Kreutz, and a prima facie tort alleging that Kreutz had insufficient justification for "discovering the identity of [Plaintiff] as the 'Whistle Blower' and then revealing his identity to Perry."

Counts 11 through 21 of the Complaint allege various negligent torts based upon a breach of a duty of due care, a duty to provide a safe work place, a duty to warn Plaintiff of dangers posed by Perry, negligent hiring and negligent infliction of emotional distress. In Count 22, Plaintiff alleges similar negligent torts as violations of the LHWCA against Matson.

Counts 23 and 24 allege violations of the federal and state RICO statutes. Plaintiff asserts subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1333 and 1367. Defendant Matson moves for Summary Judgment on grounds that Plaintiff's negligence and intentional tort claims are barred because they are governed by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and that Plaintiff's RICO claim is barred because Plaintiff fails to meet the requirements for federal and state RICO claims.

Defendant ILWU moves to dismiss Counts 4, 8, 10-15, 2021, 23 and 24 on the grounds that Plaintiff's tort claims are preempted by Labor Management Relations Act ("LMRA") § 301 and that Plaintiff fails to state a claim under RICO.

Defendant McCabe moves for partial summary judgment because Plaintiff does not have standing to sue for RICO and Plaintiff's state claims are preempted by the National Management Relations Act ("NMRA").

Plaintiff filed replies and memoranda in opposition to Defendants' motions. On November 4, 1996, Plaintiff filed a cross-motion for summary judgment on the issues of whether Matson or McCabe were Plaintiff's employer for purposes of the LHWCA and whether Plaintiff has standing to pursue a civil RICO claim.

STANDARD OF REVIEW

I. Motion to Dismiss

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For the purposes of a 12(b)(6) motion, "[r]eview is limited to the contents of the complaint." Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994)

A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992) (quoting Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989)) (further citations omitted). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. Id. Civil rights complaints are to be liberally construed. Id. (citing Gobel v. Maricopa County, 867 F.2d 1201, 1203 (9th Cir. 1989)).

To the extent, however, that "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed. R. Civ. P. 12(b); Del Monte Dunes at Monterey, Ltd. v. Monterey, 920 F.2d 1496, 1507 (9th Cir. 1990).

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989); Buckey v. County of Los Angeles, 968 F.2d 791, 794 (5th Cir. 1992). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. Love, 915 F.2d at 1245.

II. Motion for Summary Judgment

Fed. R. Civ. P. 56(c) provides for summary judgment when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The movant bears the initial burden of "identifying . . . those portions of the material on file that it believes demonstrates the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). If the movant has met its burden, then "the nonmoving party must show that there are 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party.'" California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986)), cert. denied, 108 S. Ct. 698 (1988). When the "evidence" produced by each side conflicts, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." Inferences from the facts, disputed and undisputed alike, must be drawn in the light most favorable to the opposing party. T.W. Elec., 809 F.2d at 631. These genuine factual issues must be supported by significant probative evidence. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). Hence, the nonmoving party may not stand on its pleadings or merely assert it will controvert the movant's evidence at trial. See T.W. Elec., 809 F.2d at 630. Simple disagreement about a material issue of fact, therefore, no longer precludes the use of summary judgment. California Architectural Bldg. Prod., 818 F.2d at 1468.

DISCUSSION

I. Defendant Matson's Motion for Summary Judgment

Defendant Matson contends that Plaintiff's state law claims are barred by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(a). Matson further argues for dismissal of Plaintiff's federal RICO claim on the ground that it excludes recovery for Plaintiff's alleged personal injuries.

A. Longshore and Harbor Workers' Compensation Act

District courts have original and exclusive jurisdiction over any civil case of admiralty or maritime law pursuant to 28 U.S.C. § 1333(1). Delta Country Ventures Inc. v. Maqana, 986 F.2d 1260 (9th Cir. 1993). The initial inquiry is whether Plaintiff's tort claims are within this court's admiralty jurisdiction. The Supreme Court has held that in evaluating maritime tort claims, "the wrong must bear a significant relationship to traditional maritime activity." Solano v. Beilby, 761 F.2d 1369, 1370 (9th Cir. 1985) (citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253 (1972)). The Ninth Circuit applies a two-part test to tort claims brought within the maritime context. The first part of the maritime tort test focuses on the place where the injury occurs. Martinez v. Pacific Industrial Service Corp., 904 F.2d 521, 522-23 (9th Cir. 1990). The second part of the test asks whether the alleged tort has a sufficient nexus to traditional maritime activity, considering four factors: (1) traditional concepts of the role of admiralty law; (2) the function and role of the parties; (3) the types of vehicles and instrumentalities involved; and (4) the causation and nature of the injury suffered. Owens-Illinois Inc. v. United States Dist. Court for the W. Dist. of Wash. at Tacoma, 698 F.2d 967, 970 (9th Cir. 1983).

The first part of the test is met. Plaintiff and Defendant Perry were at the Pier 52 parking lot when Plaintiff arrived for work. Plaintiff drove his car to a stall near the entrance gate to the work area and away from Perry. Perry allegedly went across the parking lot to Plaintiff's car, confronted him and told him "we gonna fight now." Amended Complaint at 9 §38. It was at that point that Plaintiff claims he was allegedly assaulted by Perry. The injury occurred on the pier at the job site.

As for the second part of the test, traditionally the courts have interpreted maritime injuries to include, for instance, accidents which occur during the loading of cargo onto a vessel

by longshoremen. See Solano, 761 F.2d at 1371. The policy behind the law is the "concern for providing remedies to those confronting the dangers of maritime employment . . ." Id. (citing Austin v. Unarco Industries, 705 F.2d 1, 11 (1st Cir. 1983)). As in Solano, the relevant inquiry in the instant case is "whether the injury was inflicted during the conduct of a maritime service, such as loading cargo." Id. at 1372. Plaintiff admits that his injuries were inflicted prior to Plaintiff's work shift at the Matson Terminals facility, and therefore Plaintiff was not injured while engaged in maritime activity. Moreover, an assault by a co-worker is not an injury with sufficient "maritime flavor" necessary to invoke jurisdiction under § 1333(1). The underlying tort bears no real relationship to maritime service, commerce or navigation. Martinez, 904 F.2d at 521 (9th Cir. 1990) (reversing district court's dismissal of admiralty claim because cleaning boilers of ships is routinely necessary to the operation of the vessel). See also, H20 Houseboat Vacations Inc. v. Hernandez, 1996 WL 734770 (9th Cir. 1996) (affirming dismissal of maritime core claim based on finding that tort injury had no potential to disrupt maritime commerce).

The Ninth Circuit has found, as does the court in this case, that "[r]esolution of [Plaintiff's] tort claims does not require the special expertise of a court in admiralty as to navigation or water-based commerce, nor is there any federal interest in uniformity of decision requiring the application of 10 federal substantive law." Sample v. Johnson, 771 F.2d 1335 (9th Cir. 1985) ("district court was thus correct in viewing the intentional harm claim as involving little more than the state law tort of intentional infliction of emotional distress and not an admiralty claim at all."). The court finds that the court lacks § 1333 jurisdiction over Plaintiff's admiralty tort claims and accordingly DISMISSES Plaintiff's admiralty claims.[1]

B. Federal RICO Claim

Matson argues that Plaintiff's RICO claim fails because he cannot demonstrate proof of concrete financial loss, as is required for a plaintiff to have standing to sue under RICO. However, Plaintiff claims that he has alleged three types of injuries to business or property: (1) his lost ability to pursue his profession, (2) the work he was required to perform for others under the threat of bodily harm, and (3) his lost employment while in protective custody awaiting the criminal trial of Bruce Perry.

To support a claim under RICO Title 18 United States Code section 1964(c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (emphasis added). The Ninth Circuit has long established that "not all injuries are compensable under this section." Oscar v. University Students Co-op. Ass'n., 965 F.2d 783, 785 (9th Cir. 1992). In fact, personal injuries are not compensable under RICO. Id. The purpose behind Congress' prohibition on recovery for personal damages is consistent with its intention to "thwart the organized criminal invasion and acquisition of legitimate business enterprises and property." Id. at 786 (quoting Genty v. Resolution Trust Corp., 937 F.2d 899, 918-19 (3rd Cir. 1991)).

In Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990), the Ninth Circuit adopted the Eleventh Circuit's approach holding that "as a matter of law, personal injury, including emotional distress, is not compensable under section 1964(c) of RICO." In following the rationale of the Eleventh Circuit in Grogan v. Platt, 835 F.2d 844 (11th Cir. 1988), this

Circuit determined that pecuniary losses stemming from personal injuries are not compensable under RICO. Berg, 915 F.2d at 464.
In other words, "the phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom." Grogan, 835 F.2d at 847.

In Plaintiff's cross-motion for summary judgment, he provides little support for his claim of RICO standing. He states that Plaintiff's neurosurgeon has found him to be permanently blind in one eye. Plaintiff claims that his doctor states that he should not operate heavy equipment due to his loss of vision. These factors indicate that Plaintiff seeks compensation for personal injuries. Although he claims that he seeks compensation for the "rates of pay associated with various economic opportunities" due to his reduced marketability, Plaintiff has not demonstrated that the losses are more than personal damages for which he seeks pecuniary compensation. As the Grogan court acknowledged,

> the pecuniary and non-pecuniary aspects of personal injury claims are not so separated as the appellants would have us accept; rather, loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering are often to be found, intertwined, in the same claim for relief.
>
> ****
>
> [T]hese statutes and cases suggest that pecuniary losses are so fundamentally a part of personal injuries that they should be considered something other than injury to "business or property."

Grogan, 853 F.2d at 847. Plaintiff has failed to demonstrate that the losses for which he seeks recovery are losses to business or property as contemplated by RICO. In fact, Plaintiff's claim of damages has no relationship to Congress' intention to prevent

organized criminal invasion and acquisition of legitimate business enterprises and property. Because Plaintiff lacks standing to pursue a federal RICO claim, the court GRANTS Defendants' Motions for Summary Judgment as to Plaintiff's federal RICO claim.[2]

C. Diversity Jurisdiction

In addition to asserting federal question jurisdiction based on RICO and tort claims under the LHWCA, Plaintiff argues that this court has subject matter jurisdiction based upon diversity of citizenship pursuant to § 1332.

Title 28 U.S.C. § 1332(a) empowers district courts with original subject matter jurisdiction of "all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between . . . citizens of different States." A federal court can exercise diversity jurisdiction over a matter in which the plaintiff sues more than one defendant only if the plaintiff is capable of suing each defendant individually. This rule, known as the "requirement of complete diversity," calls upon the court to dismiss all defendants from a diversity action who reside in the same state as the plaintiff, and who are not indispensable under Fed. R. Civ. P. 19. See Charles A. Wright et al., Federal Practice and Procedure § 3605 (2d ed. 1984).

In the present case, Plaintiff asserts that he is a citizen of the State of Arizona and Defendants are corporations doing business in the State of Hawaii and that the facts constituting the subject of this lawsuit all took place in Hawaii. Amended Complaint at 3-5.

Generally, the proponent of jurisdiction bears the burden of proof in diversity cases. Lew v. Moss, 797 F.2d 747, 751 (9th Cir. 1986) (citing Resnik v. La Paz Guest Ranch, 289 F.2d 814, 819 (9th Cir. 1961)). Plaintiff claims he has been employed by McCabe on the Honolulu waterfront for more than ten years. Amended Complaint at 5 §20. He also claims that at

all times material herein, he was employed by McCabe and that McCabe is a stevedoring company incorporated in Hawaii, and is a corporation doing business in the State of Hawaii. Amended Complaint at 3-4. Plaintiff provides no explanation for how a person employed by a Hawaii corporation, who has been working in Honolulu for ten years could be an Arizona resident. It is well settled that "domicile" for purposes of diversity is the location where a person has established a fixed habitation in a particular place, and intends to remain there indefinitely. Lew, 797 F.2d at 750. Moreover, courts have created a presumption in favor of an established domicile as opposed to a newly acquired one. Id. at 751. Therefore, even if Plaintiff moved to Arizona recently, or sometime soon after or before filing suit, he has not met the burden of establishing Arizona domicile for purposes of diversity. Consequently, the court finds that diversity jurisdiction is lacking in this case.

Because the court lacks federal question and diversity jurisdiction over Plaintiff's claims, the court declines to assert supplemental jurisdiction over Plaintiff's state tort and RICO claims, and DISMISSES them for lack of jurisdiction. Moreover, the court does not reach the merits Defendant ILWU's Motion to Dismiss and Defendant McCabe's Motion for Partial Summary Judgment as all of Plaintiff's remaining claims have been dismissed for lack of jurisdiction.

CONCLUSION

For the reasons stated above, the court GRANTS all Defendants' Motions for Summary Judgment on the federal RICO claim and DISMISSES WITHOUT PREJUDICE all remaining claims against the Defendants for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, FEB 20 1997.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT COURT

Quentin Hideyuki Tahara vs. Matson Terminals, Inc., et al., Civil Nos. 96-00284 DAE, 96-00412 DAE, 96-00410 DAE; ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON FEDERAL RICO CLAIM AND DISMISSING WITHOUT PREJUDICE ALL REMAINING CLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION.

1. Plaintiff's available remedies do not include recovery of workers' compensation under the LHWCA as he is apparently as of late receiving those benefits from Matson. However, Plaintiff did seek remedies under "all other applicable maritime and tort law in the premises." Amended Complaint at 2. Furthermore, the court declines to excercise supplemental jurisdiction over Plaintiff's state tort claims for reasons discussed in part C of this order.

2. The court declines to reach the merits of Plaintiff's state RICO claim and resolves it, along with Plaintiff's other state claims in part C of this order.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

QUENTIN HIDEYUKI TAHARA,	)	NO. 96-00284 DAE
	)	96-00412 DAE
Plaintiff,	)	96-00410 DAE
	)	
vs.	)	
	)	
MATSON TERMINALS, INC.; MATSON NAVIGATION COMPANY, INC.; McCABE HAMILTON & RENNY, CO., LTD.; INTERNATIONAL LONGSHOREMEN AND WAREHOUSEMEN'S UNION, LOCAL 142; BRUCE GEORGE PERRY; and HENRY KREUTZ, JR., In Personam; and DOE VESSELS 1-XX, In Rem; JOHN DOES 1-20; MARY DOES 1-10, DOE CORPORATIONS 1-20; DOE PARTNERSHIPS 1-20; DOE ASSOCIATES 1-20; DOE GOVERNMENTAL AGENCIES 2-20; DOE STATES and OTHER ENTITIES 1-20,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFF'S
CROSS MOTION FOR LEAVE TO
FILE A SECOND AMENDED COMPLAINT

Pursuant to Local Rule 220-2(d), the court finds this matter suitable for disposition without a hearing. After

reviewing Plaintiff's Motion and the supporting and opposing memoranda, the court DENIES Plaintiff's Cross Motion for Leave to File a Second Amended Complaint.

BACKGROUND

Plaintiff Quentin Hideyuki Tahara ("Plaintiff") and Defendant Bruce Perry ("Perry") were members of the International Longshoremen and Warehousemen's Union Local 142 ("ILWU"), and were employed by Defendant McCabe, Hamilton & Renny Co. ("McCabe"), a labor contractor operating on the Honolulu waterfront. Defendant McCabe contracts with Defendant Matson Terminals ("Matson") to provide Matson with workers to load and unload ships, and McCabe in turn has a collective bargaining agreement with ILWU to provide workers for Matson and other companies.

While working for McCabe, Plaintiff observed what he believed to be a longstanding practice of longshore workers "running away" from job sites in order to be paid for work not performed.

On March 10, 1994, while Plaintiff was working for McCabe at a Matson terminal, he observed Perry arrive at the job site for work and leave without permission from the supervisor. He confidentially reported this observation to employees at Matson, who in turn reported it to McCabe Perry's pay was docked as a result.

The ILWU and Defendant Henry Kreutz, Jr. ("Kreutz"), a McCabe employee and union representative for ILWU, allegedly "used the authority and power of the union to learn who reported Perry of [Plaintiff's] identity." Kreutz confronted Plaintiff in a hostile manner, reprimanded him for reporting Perry's actions and told him that Perry was on an "excusable leave."

On March 30, 1994, Perry accosted Plaintiff in the Pier 52 parking lot at the Matson Terminal, and demanded to know why Plaintiff had caused Perry's pay to be docked. In the ensuing "fray" Perry assaulted Plaintiff. In assaulting Plaintiff, Perry allegedly "believed he was the agent of his employer McCabe and ILWU because Perry intended his actions in part to benefit McCabe and ILWU by enforcing the "running away" practice.

After the assault, ILWU and the other Defendants purportedly ratified and condoned the assault by continuing to employ Perry and by paying him double time for the shift in question. Plaintiff subsequently filed a Complaint against all of the Defendants, setting forth 24 separate counts.

On November 15, 1996, Plaintiff filed a Cross Motion for Leave to File a Second Amended Complaint. Defendant McCabe filed a Memorandum in Opposition to Plaintiff's Cross Motion on November 21, 1996. Defendant ILWU also filed an Opposition to Plaintiff's Cross Motion on November 25, 1996.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide that parties should be freely permitted to amend their pleadings when justice so requires:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . .

Fed. R. Civ. P. 15(a). However, a motion to amend may be denied if permitting the amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1989) (citations omitted). Of these factors, prejudice to the opposing party is the most important. Id.

DISCUSSION

Plaintiff seeks to amend because at the second trial of Defendant Perry, "there was testimony regarding the events surrounding this incident and the practices on the waterfront. Information garnered from that trial as well as information in discovery have changed certain factual allegations and added new factual allegations and legal theories in this case." Motion at 4. On the other hand, McCabe argues that Plaintiff has given no indication of what he wants to amend, making it impossible for it to evaluate the legal sufficiency of the basis of such a request. The court agrees.

Although Rule 15(a) has been given a liberal interpretation, "leave to amend is not to be granted automatically." Jackson, 902 F.2d at 1387. In this case, substantial discovery has already taken place, and the Defendants have been notified of the causes of action Plaintiff asserts against them. Now Plaintiff seeks to assert new factual allegations and legal theories which are unbeknown to Defendants. In Jackson, the Ninth Circuit affirmed the district court's denial of leave to amend, noting that "[p]utting the defendants 'through the time and expense of continued litigation on a new theory, with the possibility of additional discovery would be manifestly unfair and unduly prejudicial.'" Id. at 1388 (citing Priddy v. Edelman, 883 F.2d 438, 447 (6th Cir. 1989)). Likewise, this court finds that allowing Plaintiff to amend his complaint at this juncture, particularly without providing the court with any clues as co what he wants co amend, would be unduly prejudicial.[1]

CONCLUSION

For the reasons stated above, the court DENIES Plaintiff's Cross Motion for Leave to File a Second Amended Complaint.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, FEB 12 1997.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT COURT

Quentin Hideyuki Tahara vs. Matson Terminals, Inc., et al., Civil Nos. 96-00284 DAE, 96-00412 DAE, 96-00410 DAE; ORDER DENYING PLAINTIFF'S CROSS MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

1. The Local Rules provide that "[a]ny party filing or moving to file an amended pleading shall reproduce the entire pleading as amended and may not incorporate any part of a prior pleading by reference, except with leave of court." L.R. 120-3. Plaintiff apparently failed to comply with this rule, as evidenced by the court's inability to determine what changes Plaintiff proposes in his amended Complaint.

UNITED STATES DISTRICT COURT

District of Hawaii

QUENTIN HIDEYUKI TAHARA

v.

MATSON TERMINALS, INC., et al.

JUDGMENT IN A CIVIL CASE

(Filed 3/4/97)

Case Number:
Civil 96-00284-DAE
Civil 96-00410-DAE
Civil 96-00412-DAE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Summary Judgment is entered in favor of all Defendants and against Plaintiff on the federal RICO claim. IT IS FURTHER ORDERED AND ADJUDGED that all of Plaintiff's remaining claims against Defendants are DISMISSED Without Prejudice for lack of subject matter jurisdiction.

cc: all counsel

MAR 04 1997
Date

WALTER A.Y.H. CHINN
Clerk

/s/
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

District of Hawaii

QUENTIN HIDEYUKI TAHARA

v.

MATSON TERMINALS, INC., et al.

AMENDED JUDGMENT IN A CIVIL CASE

(File May 5, 1997)

Case Number:
Civil 96-00284-DAE
Civil 96-00410-DAE
Civil 96-00412-DAE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the "Order Granting Defendants' Motion for Summary Judgment on Federal RICO Claim and Dismissing Without Prejudice All Remaining Claims For Lack of Subject Matter Jurisdiction," filed February 20, 1997 is hereby MODIFIED. IT IS FURTHER ORDERED that the Plaintiff's Claims for Duty to Provide a Safe Workplace, Duty to Warn, Duty to Dispatch, Interference with Prospective Advantage, and State RICO Claims against ILWU are hereby DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED that Plaintiff's Remaining State Claims are hereby REMANDED to State Court. IT IS FURTHER

ORDERED that Plaintiff's Request for Clarification is hereby DENIED.

cc: all parties

MAY 5 1997
Date

WALTER A.Y.H. CHINN
Clerk

/s/
(By) Deputy Clerk

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
Provisions of the ORGANIZED CRIME CONTROL ACT OF 1970

(Act of October 15, 1970, Public Law 91-452, Section 901(a), 84 Stat. 941, effective October 15, 1970, as amended; 18 U.S. Code Secs. 1961 through 1968).

18 U.S.C. § 1961. Definitions

As used in this chapter -

(4) "enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1984[1]

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (33 U.S.C. §§ 904 and 905),

SHORT TITLE

Sec. 1. This Act may be cited as the "Longshore and Harbor Workers' Compensation Act Amendments of 1984."

LIABILITY FOR COMPENSATION

Sec. 4.(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefits of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

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[1] Includes 1984 amendments made by P.L. 98-426 which are printed in italic.

EXCLUSIVENESS OF REMEDY AND THIRD-PARTY LIABILITY

Sec. 5.(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. *For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employee only if the subcontractor fails to secure the payment of compensation as required by section 4.*